BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE, NO. 01-244 (Judge Charles W. Cope)	**:**	**CASE NO.: SC01-2670**

RESPONDENT'S MOTION FOR COSTS AND ATTORNEYS FEES

The Respondent, the Honorable Charles W. Cope, respectfully moves the Judicial Qualifications Commission for it to enter an award of costs in his favor pursuant to Rule 2.140 of the Rules of Judicial Administration. Judge Cope also requests this Commission to award him reasonable and necessary attorneys fees pursuant to section 57.105, Fla. Stat. In support of this requested relief Judge Cope states:

COSTS

1. Judge Cope is the prevailing party to this action given that a directed verdict was granted in his favor on all of the counts that were at issue in the proceedings before this Commission. Though this Commission in its Findings, Conclusions and Recommendations found that Judge Cope acted inappropriately with regard to having been publicly intoxicated and having engaged in inappropriate conduct of an intimate nature, Judge Cope never contested, and, in fact at all times during the course of these proceedings, admitted to having engaged in such regrettable conduct. He also admitted that such conduct was inappropriate and warranting of a public reprimand. Special Counsel, however, irrationally and unreasonably insisted on pursuing in these proceedings the unfounded and unwarranted charges of attempted forcible entry, theft, lying to the police and failing to report. Special Counsel did so in an admitted effort to have Judge Cope permanently removed from the bench after admitting approximately four months before the trial of this matter that insufficient evidence existed to support prosecution of the charges of attempted forcible entry, theft, lying to police and failure to report. Special Counsel, as the

record in this case establishes, attempted to embarrass Judge Cope into resigning. It was only those unwarranted and unfounded charges for which a directed verdict was ultimately entered that were ever at issue in these proceedings. Judge Cope, having obtained a directed verdict on the only charges that were ever at issue in these proceedings, is the prevailing party in this action and as such is entitled to an award of those reasonable and necessary costs that he incurred in defense of the unfounded and unwarranted charges unreasonably pursued by the Special Counsel in his irrational effort to have Judge Cope removed from the bench.

2. Rule 2.140, Judic. Admin, Rules, provides in pertinent part:

> The Supreme Court may award reasonable and necessary costs, including costs of investigation and prosecution, to the prevailing party. Neither attorneys' fees nor travel expenses of commission personnel shall be included in an award of costs. Taxable costs may include:
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> (1) court reporters' fees, including per diem fees, deposition costs, and costs associated with the preparation of the transcript and record; and
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> (2) witness expenses, including travel and out-of-pocket expenses.

3. In Moritz v. Hoyt Enterprises, Inc., 604 So.2d 807 (Fla. 1992), the Florida Supreme Court held that "the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party . . . " As stated above, there was never any issue in these proceedings concerning Judge Cope's having engaged in the conduct for which this Commission has recommended he be reprimanded. Judge Cope at all stages of these proceedings admitted to Special Counsel, the Investigative Panel and the Hearing Panel that he engaged in such conduct and that his actions were inappropriate and deserving of a public reprimand. This Commission expressly found with regard to count I, Public Intoxication: "Both Judge Cope and his counsel admitted that his conduct under this charge was

entirely inappropriate." (Findings, Conclusions and Recommendation by the Hearing Panel of the JQC, p. 5). This Commission similarly found with regard to Count III, Inappropriate Conduct of an Intimate Nature: "Again both Judge Cope and his counsel consistently agreed that his conduct under this charge was entirely inappropriate." (*Id.*, p.6). In contrast, the only matters at issue in the proceedings before this Commission was whether Judge Cope had committed theft of the hotel room key, had attempted to forcibly enter into and peer inside the hotel room, had made material false statements to the police and had inappropriately failed to report the citizen's arrest to the JQC and litigants appearing before him. A directed verdict was ultimately entered by the Commission in Judge Cope's favor on all such issues. Accordingly, Judge Cope is the party that prevailed on the significant issues of the litigation and should be considered the prevailing party for purposes of awarding costs pursuant to Rule 2.140 of the Rules of Judicial Administration.

4. Those costs that Judge Cope reasonably and necessarily incurred in defense of the significant issues in these proceedings are set forth in the affidavit of costs and attorneys fees attached hereto as Exhibit A and incorporated herein by reference. Such costs total $72,470.29.

ATTORNEYS FEES

5. In addition to being entitled to an award of his costs as a result of being the prevailing party, Judge Cope should also be awarded the reasonable and necessary attorneys fees that he incurred in

defending against the unfounded charges of theft, attempted forceful entry/peering, lying to the police and failure to report, pursuant to §57.105, Florida Statutes.

6. Section 57.105, Florida Statutes provides in part:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
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> (b) Would not be supported by the application of then-existing law to those material facts.

§ 57.105(1)(a), (b), Fla. Stat. (2000). See also, Gahn v. Holiday Property Bond, Ltd., 2002 WL 1821633, p. 2 (Fla. 2d DCA 2002). In Gahn the court explained the affect of the legislature's 1999 amendment to section 57.105, Fla. Stat..

> The 1999 amendment to section 57.105 substantively changed the standard for awarding fees for baseless actions and defenses. Ch. 99-225, § 4, at 1406 Laws of Fla.; Forum v. Boca Burger, Inc., 788 So.2d 1055, 1060-61 (Fla. 4th DCA 2001), *review granted*, 817 So.2d 844 (Fla.2002). As the Fourth District noted in Boca Burger, cases interpreting the language of the former version of section 57.105 are now of little precedential value because the 1999 amendment altered the substantive standard for making fee determinations under the statute. Id. at 1061. Prior to the amendment, fees could only be awarded in cases where there was a "complete absence of a justiciable issue of either law or fact" in the nonmoving party's position. § 57.105(1), Fla. Stat. (1997). Fees may now be awarded under this statute if evidence establishes that the party or attorney knew or should have known that the claim or defense was (a) not supported by material facts or (b) not supported by the application of existing law. § 57.105(1)(a), (b), Fla. Stat. (2000). Therefore, in order to determine whether the trial court abused its discretion in denying Appellants' motion for fees, we must consider whether Appellees' motion to dismiss was supported by material facts or the application of existing law.

Id at p. 2.

7. Judge Cope, at all stages of these proceedings, repeatedly pointed out to the Special Prosecutor that the charges of theft, attempted forceful entry/peering, lying to the police and failure to report was not supported by the material facts necessary to establish such charges. Judge Cope also repeatedly pointed out to the Special Prosecutor that the charges were not founded in the law. For example, Judge Cope repeatedly reminded the Special Prosecutor that Judge Cope's failure to report the misdemeanor citizen's arrest to the JQC did not violate any legal duties or judicial cannons[1]. Judge Cope raised these issues with the Special Prosecutor orally, in writing and by way of formal motions. Judge Cope herein incorporates his Motions for Dismissal Due to Vindictive Prosecution and Selective Prosecution and his motions for Summary Judgment that were filed in these proceedings. As described in detail in such documents Special Counsel admitted that there was no legal or factual basis to pursue the claims of theft, attempted forceful entry/peering, lying to the police and failure to report and that he knew he could not obtain a conviction on such charges. Special Counsel nonetheless continued to prosecute such charges in violation of his legal and ethical obligations in an effort to embarrass Judge Cope into resigning. A directed verdict was ultimately granted by this Commission on the charges of theft, attempted forceful entry/peering, lying to the police and failure to report because such charges had no basis in law or fact.

8. As a result of the Special Prosecutors irrational and unreasonable prosecution of Judge Cope on charges that the Special Prosecutor knew to be unfounded in law and fact, Judge Cope was forced to incur substantial attorneys fees and costs. Judge Cope's attorneys fees through July, 2002 that

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[1] The Hearing Panel expressly found with regard to the failure to report charge: "As to count VI, the panel finds there was no legal or ethical Canon that forms the basis of the charge. . . Despite requests by the Chair of this Panel for case law or Canon authority, none have been supplied. In the absence of a Canon to point to, Judge Cope cannot be properly found guilty of a violation unless his inaction would bring the judiciary into disrepute and there is no clear and convincing evidence on this point." (p. 15).

he incurred in defense of the unfounded claims total $316,465.00 for legal representation by the law firm of Merkle & Magri, P.A.

WHEREFORE, Judge Cope respectfully requests this Commission to enter a Judgment in the amount of $72,470.29 so as to compensate Judge Cope for the reasonable and necessary costs he incurred in these proceedings. Judge Cope further requests this court to enter a Judgment in the amount of $316,465.00 so as to compensate Judge Cope for the reasonable and necessary attorneys fees he incurred in defending the knowingly unfounded charges of theft, attempted forceful entry/peering, lying to the police and failure to report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Motion for Costs and Attorneys' Fees, has been furnished, on this _____ day of August, 2002, via Facsimile Transmission and by U.S. Mail, postage prepaid, to the following persons:

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